IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

SECOND APPEAL NO. 220 OF 1988

1. Smt. Zunkabai widow of Baburao Jadhav (Wagh) since deceased through her heirs and legal representatives Dagubai widow of Hari Jadhav (since deceased) through her heirs and legal representatives:)

1A. Shri Punjaram Hari Jadhav aged major, Occupation Agriculturist.)

1B. Sau. Hirabai Raosaheb Gaikwad, Aged major Occupation Housewife.)

Both resident of Bharvir, Post Talwade, Taluka Chandwad, District Nasik.)..Appellants

Versus

1. Varubai wd/o Wagh)

2. Chatursing Bhaguji Jadhav aged 39 years, through General Mukhtyar, Bhaguji Sakharam Jadhav, aged 69 years.)

3. Fakiora Vithoba Jadhav, aged 44 years,)

4. Radhakisan Ramchandra Jadhav, aged 45 years.)..Respondents

Mr. R.A. Thorat for the Appellants.
Mr. S.M. Gorwadkar for Respondent Nos. 1 and 2.

CORAM: ABHAY S. OKA, J.

DATE: JULY 02, 2004.

ORAL JUDGMENT

This Second Appeal was finally heard on 28th June, 2004 and was kept

today for dictation of judgment.

2. The Second Appeal was admitted on 9th June, 1988 by framing following substantial question of law.

"In the circumstances of the case, is the finding of the Courts below that Baburao had blended the suit property with other joint family property?" legal

3. I have heard the Counsel appearing for the parties on the aforesaid substantial question of law.

4. With a view to appreciate the controversy involved in the Second Appeal, it is necessary to refer to the facts of the case in brief.

5. The Appellants are Defendant Nos.1 and 2. The respondent Nos. 1 and 2 are original Plaintiffs and Respondent Nos. 3 and 4 are the original Defendant Nos. 3 and 4. It is necessary to refer to the genealogy showing the relationship between the parties.

	Rambhaji			Sister of Rambhaji. Narayan (Husband)
Laxmibai (Wife No.1)	Belibai (Wife No.2)		Baburao	Bhaguji
Sitabai	Dagubai (Married to Baburao)	Zunkabai (Defendant No.1) (Married to Baburao after demise of Dagubai)	Warubai (Plff. No.1)	Chatarsingh (Plff. No. 2)

6. The case of the original Plaintiffs is that one Rambhaji was the original

owner of the suit property. The said Rambhaji had two wives by the name Laxmibai and Belibai. Rambhaji had a sister whose name is not on record. The name of the sister's husband is Narayan. Laxmibai had no issue and Rambhaji had three daughters from his second wife Belibai. The three daughters were Sitabai, Dagubai and Zunkabai. Baburao and Bhaguji are the two sons of Narayan. The Plaintiffs are the legal representatives of Bhaguji. The Plaintiff No.1 is the widow of Bhaguji. Defendant No.2 is the husband of Zunkabai's daughter.

7. The case of the Plaintiffs is that Rambhaji executed a will dated 5th May, 1911 in respect of the suit property and by the said will, a bequest was made in favour of Dagubai i.e. daughter of Rambhaji. It is to be noted here that Baburao, son of Narayan was married to Dagubai and after the demise of Dagubai, Baburao married to Zunkabai i.e. Sister of Dagubai. The case is that as per the will, Dagubai became owner of the suit property. After the demise of Dagubai, her husband Baburao became the owner of the suit property. The further case of the Plaintiffs is that Baburao was staying jointly with his younger brother Bhaguji. A specific case is made out that after demise of Dagubai, Baburao blended the suit property with the property of the Joint Hindu family consisting of Baburao and his brother Bhaguji. In view of the said blending, both the brothers jointly cultivated the suit property during their life time.

8. The Plaintiff No.1 is the widow of Bhaguji, brother of Baburao. Bhaguji expired on 31st December, 1948. The case of the Plaintiffs is that due to blending of

the suit property made by Baburao, Bhaguji had half share in the suit property and, therefore, his widow inherited half share of the said Bhaguji in the suit property. It is stated in the plaint that Plaintiff No.1 and Defendant No.1 Zunkabai were jointly residing in the suit property and were jointly cultivating the suit property by employing servants. Further case of the Plaintiffs is that Plaintiff No.1 executed a deed of gift dated 31st December, 1965 in respect of the share of Plaintiff No.1 in favour of the Plaintiff No.2. The suit is filed for partition and separate possession of half share in the suit property.

9. The suit was resisted by Defendant No.1-Zunkabai by filing written statement. In the written statement, it is contended that Rambhaji had no right to execute the alleged will as the suit property was not his self-acquired property. It was stated that the will was not admitted by Defendant No.1. The Defendant No.1 also denied the theory of blending pleaded by the Plaintiffs. The Defendant No.1 stated that Baburao and Bhaguji were not resided together. The Defendant No.1 contended that Bhaguji had no right, title or interest in the suit property and, therefore, Plaintiff No.1 could not have executed a gift deed in favour of Plaintiff No.2.

10. The trial Court framed various issues. The trial Court held that the suit property was joint Hindu Family property of Baburao and Bhaguji. The trial Court also held that Defendant No.1 has failed to prove that the Will dated 5th May, 1911 was executed under undue influence and is void. The trial Court also upheld the

validity of gift deed in favour of Plaintiff No.2 and passed a decree for partition and separate possession in favour of the Plaintiffs.

11. The present Appellants preferred an appeal in the District Court. The said appeal was dismissed.

12. Being aggrieved by the judgments and decrees of both the Courts below, the Appellants i.e. Defendant Nos. 1 and 2 have preferred this Second Appeal.

13. Shri Thorat, learned Counsel appearing for the Appellants, contended that there is no evidence to show that Baburao and Bhaguji were residing together and they constituted a joint family. He submitted that apart from the fact that there is no evidence of blending, it is not established that Baburao and Bhaguji were holding any other joint family property. He, therefore, submitted that the finding recorded by the Courts below on the issue of blending is perverse. He further submitted that the findings recorded by both the Courts below as regards proof of the Will allegedly executed by Rambhaji are also perverse in as much as Will is not proved as required by the provisions of the Indian Evidence Act, 1872. He submitted that Section 90 of the said Act had no application.

14. Shri Gorwadkar, learned Counsel appearing for the original Plaintiffs,

supported the judgments and decrees of both the Courts below. He submitted that there is a clear finding of fact recorded on the issue of blending and the said findings of fact are based on legal evidence on record and, therefore, no interference is called for in a Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the said Code"). He submitted that the Will in dispute was of the year 1911 and both the attesting witnesses were dead. He submitted that Will has been held to be proved by both the Courts below and the findings recorded in that regard cannot be said to be perverse or illegal.

15. In so far as submission made by Shri Thorat as regards the execution of the Will is concerned, it must be stated that no substantial question of law has been framed on the issue regarding proof of Will. After having considered the findings recorded by both the Courts below, it is not possible to come to the conclusion that any substantial question of law arises in so far as proof of will is concerned.

16. If the findings of both the Courts recorded on the issue of execution of Will are accepted, it becomes clear that after the demise of Rambhaji, Dagubai became the owner of the suit property. After demise of Dagubai, her husband became the owner of the suit property. In view of the concurrent findings of Courts below on execution of Will, it is very clear that Baburao inherited the suit property after demise of his wife Dagubai. After the demise of Baburao, the property was inherited by Zunkabai in accordance with law of succession prevailing on 10th June, 1937 and in view of the subsequent enactment of the Hindu Succession Act, 1956.

The Plaintiffs are claiming share only on the ground that Baburao blended the suit property of the joint family allegedly consisting of Baburao and his brother Bhaguji. Therefore, unless the theory of blending is held as established, Bhaguji will not get any right, title or interest in respect of the said property and, therefore, the Plaintiffs cannot succeed.

17. In the plaint, and in particular paragraph 4, specific averments have been made regarding blending. The English translation of relevant portion of paragraph 4 of the plaint is as under:

> " After the demise of Dagubai, her husband Baburao became the owner of the suit property by inheritance. There was a joint family of Baburao and his younger brother Bhau Bhaguji Narayan Wagh and Baburao was the Manager and Karta of the joint family. Both the brothers were staying in House described in paragraph No.3. Baburao N. Wagh with a view not to claim independent ownership in respect of the property inherited by him as the legal representative of Dagubai blended the said property with the property of joint family of himself and his brother Bhaguji Narayan Wagh and both the brothers occupied the said property described in paragraph Nos. 1 and 3 of the plaint by accepting that the said property is of joint family. The case is very specific of blending with the existing joint family property of the brothers."

18. Before I go to the findings on this issue by the Courts below, it is necessary to refer to the law laid down by the Apex Court in ***D.S. Lakshmaiah and another vs. L. Balasubramanyam and another,*** (2003) 10 SCC P.310. The Apex Court in the said judgment has discussed the law laid down by various judgments

in so far as blending is concerned. In paragraph 19, the Apex Court has said thus:

> " Assuming the respondents can be permitted to raise such a plea without evidence in support thereof, the law on the aspect of blending is well settled that property separate or self-acquired of a member of a joint Hindu family may be impressed with the character of joint family property if it is voluntarily thrown by the owner into the common stock with the intention of abandoning his separate claim therein; but to establish such abandonment a clear intention to waive separate rights must be established. From the mere fact that other members of the family were allowed to use the property jointly with himself, or that the income of the separate property was utilised out of generosity to support persons whom the holder was not bound to support, or from the failure to maintain separate accounts, abandonment cannot be interfered, for an act of generosity or kindness will not ordinarily be regarded as an admission of a legal obligation (see Lakkireddi Chinna Venkata Reddi vs. Lakkireddi Lakshmana and K.V. Narayanan v. K.V. Ranganandhan."

The Apex Court, therefore, held that the mere fact that other members of the family were allowed to use the property jointly with the owner or that the income of the separate property was utilised out of generosity to support persons whom the holder was not bound to support, abandonment cannot be inferred. To establish such abandonment, a clear intention to waive a separate right must be established. In another judgment of the Apex Court in ***Mallesappa Bandeppa Desai and another vs. Desai Mallappa alias Mallesappa and another,*** AIR 1961 SC P.1268, the Apex Court has observed in para 11 of the judgment thus:

> "This doctrine, therefore, inevitably postulates that the owner of the separate property is a coparcener who has an interest in the coparcenary property and desires to blend his separate property ;with the coparcenary property. There can be no doubt that the

> conduct on which a plea of blending is based must clearly and unequivocally show the intention of the owner of the separate property to convert his property into an item of joint family property. A mere intention to benefit the members of the family by allowing them the use of the income coming from the said property may not necessarily be enough to justify an inference of blending; but the basis of the doctrine is the existence of coparcenary and coparcenary property as well as the existence of the separate property of a coparcener."

The Apex Court, therefore, held that the conduct on which a plea of blending is based must clearly and unequivocally show the intention of the owner of the property to convert his property into an item of joint family property. Merely showing that some other member of the property was allowed to use the land is not sufficient to draw inference that there was clear and unequivocal intention to blend the property.

19. It appears from the judgments of the Courts below that both the Courts have not considered the relevant principles governing the doctrine of blending. Therefore, it will be necessary to refer to the evidence of the parties which is on record. The Plaintiff No.2 has stated in his evidence that Baburao and Bhaguji were staying jointly. In the cross-examination he has admitted that he was not aware whether the said Baburao and Bhaguji were staying separately. He stated that he was not aware whether Baburao and Bhaguji had any property.

20. In so far as the trial Court is concerned, it proceeded on the footing that the oral testimony was not relevant to decide the issue of blending and, therefore, it

was necessary to consider the entries in the records of rights. Only on the basis of entries in the record of right, the learned Judge came to the conclusion that Plaintiff No.1 was entitled to ½ share in the suit property.

21. So far as Appellate Court is concerned, the finding is in paragraph 11 of its judgment. The Appellate Court recorded a clear finding that there is no direct evidence about assertion of blending nor in the life time of Baburao there is any entry in the name of Bhaguji. The Appellate Court has also noted the fact that entry of Bhaguji was made in the revenue records for the first time only after demise of Baburao and that also in his capacity as the legal representative of Baburao. For the purposes of establishing blending what was required to be established was a very clear and unequivocal act on the part of Baburao of waiver or relinquishment. Only finding which is recorded by the Appellate Court is that there is material to show that both brothers were staying together. That by itself obviously cannot be sufficient as proof of clear intention to abandon separate rights in the suit property on the part of Baburao. The Apex Court in the case of ***D.S. Lakshmaiah*** (supra) clearly held that merely because of a member of the family is allowed to use property is not sufficient to draw an inference of abandonment. In the facts of the case, the only finding recorded is that, brothers were jointly residing and, therefore, at the highest it can be said that Bhaguji was enjoying the suit property. However, there is total absence of any evidence showing clear intention on the part of Baburao to abandon his separate rights and in fact no such finding has been recorded by the Courts below. It will not be out of place here to mention that the

case made out in the plaint is not of mere abandonment but it is of blending by Baburao with the other property of the so-called joint family of Baburao and Bhaguji. There is no finding recorded by Courts below regarding existence of any other property jointly held by the brothers prior to the alleged act of blending.

22. Therefore, even taking the findings as recorded by the Courts below on the issue of blending are correct, the said findings are not sufficient to establish a clear intention on the part of Baburao to abandon his separate rights in the property. It is thus clear that both the Courts below have committed error by holding that there was blending of the suit property by Baburao with other properties of alleged joint family of the two brothers. The view taken by the Courts below is contrary to the law laid down by the Apex Court. The submission of the Appellants that there was no blending will have to be accepted. Therefore, the said findings are required to be set aside. Once those findings are set aside, obviously, Plaintiff No.1, widow of Bhaguji, cannot have any right title or interest in respect of the suit property and, therefore, she had no authority to execute the gift in favour of Plaintiff No.2.

23. In the result, the Appeal succeeds. The judgments and decrees of both the Courts below are quashed and set aside and Regular Civil Suit No. 278 of 1973 stands dismissed with costs throughout.

Certified copy expedited.

Judge

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

SECOND APPEAL NO. 220 OF 1988

Date of decision: July 02, 2004

Transcript of JUDGMENT

The Hon'ble Mr. Justice Abhay S. Oka, J. Sd/-

1. Whether Reporters of Local Papers may be allowed to see the Judgment ?) No

2. To be referred to the Reporters or not?)No

3. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?)No

4. Whether it is to be circulated to the Civil Judges?)No

5. Whether the case involves an important question of law and whether a copy each of the judgment should be sent to Nagpur, Aurangabad & Goa Offices?)No